STATE OF MICHIGAN

COURT OF APPEALS

JAMES P. THOMAS, JR., d/b/a BIGFOOT TOWING,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED
April 22, 2014

No. 314212
Genesee Circuit Court
LC No. 12-099337-CZ

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

JANSEN, J. (*concurring in the result*).

As the majority has explained, the neutral arbitrator inadvertently sent an e-mail to plaintiff's counsel that was actually intended for one of her own clients. Plaintiff thereafter requested that the neutral arbitrator recuse herself. In light of these facts, I believe that it was reasonable to conclude that the neutral arbitrator would suffer from a potential appearance of impropriety.

Nevertheless, I conclude that it was improper for the circuit court to remove the neutral arbitrator. As a preliminary matter, I note that the Federal Arbitration Act (FAA), 9 USC 1 *et seq*., applies in this case. The FAA governs all contracts "involving commerce" that contain an agreement to arbitrate. See 9 USC 2; see also *Citizens Bank v Alafabco, Inc*, 539 US 52, 55-56; 123 S Ct 2037; 156 L Ed 2d 46 (2003). It is unnecessary to show a "'specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" *Id*. at 57, quoting *Mandeville Island Farms, Inc v American Crystal Sugar Co*, 334 US 219, 236; 68 S Ct 996; 92 L Ed 1328 (1948). "Only that general practice need bear on interstate commerce in a substantial way." *Citizens Bank*, 539 US at 57. It is beyond serious dispute that the towing contract at issue in this case involves interstate commerce within the meaning of § 2 of the FAA. See, e.g., *Rains v East Coast Towing & Storage, LLC*, 820 F Supp 2d 743, 749 (ED Va, 2011); *Gray v Swanney-McDonald, Inc*, 436 F2d 652, 653 (CA 9, 1971).

As I recently explained in dissent in *Oakland-Macomb Interceptor Drain Dist v Ric-Man Construction, Inc*, 304 Mich App ___; ___ NW2d ___ (2014) (JANSEN, J., dissenting), "[t]he . . . FAA . . . 'does not provide for pre-award removal of an arbitrator.'" *Id*. at ___, quoting *Aviall, Inc v Ryder System, Inc*, 110 F3d 892, 895 (CA 2, 1997). Nor does the FAA

"'provide for judicial scrutiny of an arbitrator's qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service.'" *Oakland-Macomb Interceptor Drain*, 304 Mich App at ___, quoting *Florasynth, Inc v Pickholz*, 750 F2d 171, 174 (CA 2, 1984). It is well settled that a party "cannot obtain judicial review of . . . decisions about the qualifications of the arbitrators . . . prior to the making of an award." *Cox v Piper, Jaffray & Hopwood, Inc*, 848 F2d 842, 843-844 (CA 8, 1988). Quite simply, the circuit court was not permitted to remove the neutral arbitrator at this early stage of the proceedings. Instead, if plaintiff wished to challenge the purported neutrality or impartiality of the neutral arbitrator, he was required to wait until an arbitration award was issued and file a motion to vacate the award. See MCR 3.602(J)(2)(b). For this reason, I concur in the result reached by the majority in this case.

/s/ Kathleen Jansen